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MICHAEL RODAK, JR.,

No. 73-1274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DELTA AIR LINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CONSOLIDATED REPLY OF DELTA AIR LINES, INC.

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Respondent Civil Aeronautics Board (Board)[1] has late filed a brief in opposition to Delta's petition for certiorari, and several of the intervenors below have timely done so. This consolidated reply will respond to those matters on which Delta believes further elaboration is needed.

A fair summary of the position taken by the Board and intervenors on the Board's side is that the *Ashbacker*

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[1] Parties herein will be referred to by their commonly used names and references to their briefs or answers in opposition will be by party together with the page number, *e.g.*, Board p. 6.

doctrine [2] has not been violated here because Delta had an opportunity to show mutual exclusivity in a C.A.B. proceeding in which only Continental's (but not Delta's) application for new route authority between the excluded area points via Houston to Miami was heard, and that Delta allegedly failed to demonstrate economic mutual exclusivity. Delta suggests that if this be the case, we have come full circle to the situation faced and struck down by the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F.2d 17 (First Delta) where a court consisting of Judges Prettyman, Miller and Danaher said:

> "The Board says the only right of Delta is to have the issue of exclusivity decided before a *grant* of Eastern's application. It so construes the *Ashbacker* doctrine. We think such an interpretation would reduce the rule of that case to an empty shell, all form and no substance. It would mean that where two applications for a license are mutually exclusive the agency could hear one of them upon its merits and in a final order rule upon exclusivity and award the license without ever hearing the merits of the second application. Such procedure would not protect the rights of the second applicant, as we read *Ashbacker*." 228 F.2d at 21 (emphasis in original).

The approach thus struck down is precisely the approach now taken by the Board as well as the airline and civic intervenors in their attempt to justify what was done by the Board below.

The questions raised by Delta's petition for certiorari are clear questions of law. The court below avoided any consideration of Delta's *Ashbacker* claim, other than the single question of whether the Board relied "in dominant

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[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

degree" upon beyond-benefits. The court made this quite clear, saying:

> "It would serve no useful purpose for this decision to become entangled in all of the details of Delta's objections, and what the Board counsel identifies as its change in the service it really proffers so far as the excluded points are concerned. It suffices to say that the Board decision does not rest in dominant degree upon the beyond-area benefits to the 'excluded points' ". (Appendix A, p. 12)[3]

The question is therefore directly presented whether, as a matter of law, a fair reading of the Board's opinion below reveals at least the same reliance on service "beyond the market at issue" as was involved in the *St. Louis-Southeast Case*, the administrative proceeding that led to *Second Delta*.[4] If there was such comparable reliance—and in our view there clearly was—we have a clear conflict with the rule of *Second Delta* combined with a failure to explain the *sub silentio* overruling thereof.

Although the suggestion is made (Continental, p. 13-14, El Paso, p. 11) that Delta argued Continental's selection was based "solely" on beyond-area benefits, that was not and is not Delta's argument (see Delta's Petition herein, p. 19-21). The Board referred below to several other selection of carrier criteria aimed at the local market at issue. But it was the Board itself—not Delta—which characterized the "substantial beyond-area traffic support" as "*the very factor* which has led us to select Continental" (Order 73-2-89, Appendix C, p. 34-35, also quoted in Delta's petition, p. 9-10). When the ma-

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[3] Citations to the Appendix to the within Petition for a Writ of Certiorari will be in the form "Appendix" with appropriate page citation, *e.g.*, Appendix, p. 12.

[4] *St. Louis-Southeast Service Case*, 27 C.A.B. 342 (1958).

jority tells the disenter that he is ignoring "*the* very factor"—not just "*one* of the factors"—which impelled Continental's selection, the Board is saying that the beyond-area benefits to the excluded points with the attendant higher frequencies which they would support over the Houston-Miami route, are the *sine qua non* of Continental's selection—even though other factors may have been considered and found to be in Continental's favor.

Thus, the concern of Delta as brought before this Court is certainly not what an earlier Examiner may have said (Continental, p. 9-10) nor even what the Examiner may have said below (Continental, p. 11-12) but what the *Board* said was the basis for its choice. It is axiomatic that a reviewing court will look to the substance rather than the label of an agency's action to determine what has been done. *Columbia Broadcasting Station* v. *United States*, 316 U.S. 407; *Moss* v. *Civil Aeronautics Board*, 430 F.2d 891 (C.A.D.C.). The mere fact that the Board labels a route award as one in a "local market" does not prevent the Court from recognizing it as something else when in fact it is something else. *Delta Air Lines, Inc.* v. *Civil Aeronautics Board, (Second Delta)*. Thus, though the court of appeals in *Second Delta* looked to the reality of the Board's action, it failed to do so in the proceeding below. This was directly contrary to its own precedent and, therefore, emasculated *Ashbacker* as applied to air route cases.

In view of the fact that the court of appeals never reached any question other than whether the Board's decision rested "in dominant degree on the beyond-area benefits to the 'excluded points'" (see full quotation, p. 2, *supra*), this Court need go no further in determining the validity of Delta's *Ashbacker* claim or assessing the seriousness of the question presented to airline route proceedings. Nevertheless, since Intervenor Continental

has challenged Delta's demonstration [5] of mutual exclusivity [6] it is appropriate to call the Court's attention to the clear prima facie case of mutual exclusivity which appears in the record.

Intervenor Continental contends (Continental, pp. 24-27) that Delta has not proved mutual exclusivity in a manner Continental would consider appropriate. Yet Continental ignores its own parallel *Ashbacker* contentions based on *Second Delta* as currently urged by it in another case and as set out in Appendix E (Appendix, p. 74 ff).

In demonstrating mutual exclusivity, it was not incumbent on Delta (or any carrier) to exhibit and propose every conceivable operation or routing covered by its service proposal.[7] An *Ashbacker* violation was established by the showing Delta made that even the more dense

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[5] Intervenor Continental takes the position that the Board's dismissal of Delta's "excluded applications" under Section 302.911 of the Procedural Regulations removed Delta's *Ashbacker* rights. Delta submits, however, that this dismissal had no legal significance. *Ashbacker* is satisfied only by a fair comparative hearing, *in a single proceeding. Delta* v. *C.A.B. (First Delta), supra.* If Delta is correct that its legal rights were violated, this happened as a result of the Board's action in 1967, when the Board refused to consolidate Delta's applications and the other contemporaneous proceedings into the *Southern Tier* case. Thereafter, the excluded application had no legal significance. Moreover, the applications were not withdrawn by Delta, nor by it abandoned. Rather, it was the Board which allowed the applications to remain unheard for three years and then dismissed them (without prejudice under the so-called "stale" application rule discussed in Delta's Petition here in at pp. 16-19). Delta was not then required to refile the applications—a clearly useless act.

[6] In the aviation field, the mutual exclusivity is not one of electrical interference, as in *Ashbacker*, but instead results from the economic limitations on the number of carriers which can be certificated to provide particular service requirements.

[7] See *First Delta*, where an *Ashbacker* problem was recognized even before statistical data (much less schedule proposals) had been introduced at a hearing.

traffic routings would not support Delta's proposal on top of certification of an additional carrier.

Finally, the Board and Continental (Board, p. 10; Continental, p. 16-17) would have this Court believe that Delta has raised here "for the first time" the fundamental issue of failure by the Board (and subsequently by the court below) to follow the statute by allowing responsive applications mandated by the *Ashbacker* doctrine when the Board initiates a new route proceeding *sua sponte*. (See Delta's Petition, p. 16-19.) This point was specifically raised below (Reply Brief dated July 31, 1973, pp. 8-11) in response to suggestions by the Board, Continental and others, that Delta's excluded applications were "defensive" and thereby—somehow—not entitled to consideration. Delta's arguments were not faced by the court below and require the guidance of this Court.

The petition for certiorari should be granted.

Respectfully submitted,

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